IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 414

MICHAEL SHENKER, Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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NO. .....

MICHAEL SHENKER, Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 1, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the trial judge, denying defendant's motion for judgment notwithstanding the verdict, is reported at 196 F.Supp. 108 and is printed in the Appendix hereto, at page 13 below. The opinion of the Court of Appeals for the Third Circuit, printed in the Appendix at page 18 below, is not yet reported.

JURISDICTION

The opinion of the Court of Appeals was filed April 11, 1962. A timely petition for rehearing, filed May 3, 1962, was denied on June 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where only six of the eight active judges of a court of appeals take part in the decision of a petition for rehearing, and four of the six vote to grant rehearing, is the petition granted or denied?

2. Is a railroad liable, under the Federal Employers' Liability Act, for failure to provide a safe place to work for its employee who is injured when, in the course of his duties, he is performing work on the car and the premises of another carrier which his employer services by agreement with that carrier?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 46(c), and 45 U.S.C. § 51.

28 U.S.C. § 46(c): Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court en banc shall consist of all active circuit judges of the circuit.

45 U.S.C. § 51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF CASE

Petitioner filed suit in the District Court for the Western District of Pennsylvania on November 21, 1957, against respondent, Baltimore and Ohio Railroad Company (hereafter "B. & O") and against the Pittsburgh and Lake Erie Railroad Company hereafter ("P. & L.E.") (1a) The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act. Petitioner was employed, at the time of his injury, as a baggageman by the B. & O. at its Mahoningtown Station in New Castle, Pa. At that station there are tracks of the B. & O. and of the P. & L.E., and also a station of the P. & L.E. The station of the P. & L.E. was unmanned and the B. & O. ticket agent sold tickets to P. & L.E. passengers. (122a) The P. & L.E. had no employees at the station. (18a) By an arrangement between the two railroads (11a), B. & O. employees would service P. & L.E. trains stopping at Mahoningtown and running on P. & L.E. tracks. (97a)

Although petitioner was employed by the B. & O., paid by it, and subject only to the authority of B. & O. supervisory employees (75a), part of his duties were to load and unload baggage in P. & L.E. trains, as well as B. & O. trains, and to perform janitor work in both the B. & O. and the P. & L.E. stations. (74a) On October 15, 1956, petitioner was engaged in loading mail sacks on a P. & L.E. train. Both he and the baggage car attendant, a P. & L.E. employee, attempted to open the door on the P. & L.E. car to its full width (21a), but were unable to open it more than 18 or 24 inches. (18a) The baggage car attendant had reported the defective condition of the door to his superiors, but they had failed to repair it.

(21a, 42a) The mail sacks being loaded were 31 inches wide and 37 inches deep. (18a) Plaintiff was compelled to exert unusual pressure, twisting the bags and endeavoring to force them through the small opening. In so doing he injured his back. (23a)

The trial court directed a verdict for the P. & L.E., finding it was not petitioner's employer within the Federal Employers' Liability Act, and there was no diversity to support a common law claim. (122a) The jury returned a verdict for petitioner against the B. & O. of $40,000. (3a) Motion for judgment n.o.v. was denied (122a) On appeal by the B. & O., the judgment of the district court was reversed, in an opinion by Judge Goodrich, with whom Judge Ganey joined. Judge Kalodner dissented with opinion. Petitioner petitioned for a rehearing. The petition was denied, per Goodrich and Ganey, JJ., with Judges Biggs, Kalodner, Staley, and Smith dissenting from the denial of rehearing. Judges Hastie and McLaughlin took no part on the motion for rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below that rehearing is denied when four of six participating judges vote to grant rehearing presents a question of importance to the courts of appeals in the administration of their judicial business. Cf. United States v. American-Foreign S.S. Corps., 363 U.S. 685, 687 (1960).

The decision can be justified only on a reading of the statute, 28 U.S.C. § 46(c), which ignores all considerations other than the literal words. It is true that at the time of decision there were eight judges in active service on the Court of Appeals for the Third Circuit, and only four voted to grant rehearing, while the statute says rehearing en banc may be ordered "by a majority of the circuit judges of the circuit who are in active service." But this Court, in its decision first upholding the rights of the courts of appeals to sit en banc, was willing to make a "sacrifice of literalness for common sense." *Textile Mills Securities Corp. v Commissioner of Internal Revenue,* 314 U.S. 326, 334 (1941). A similar sacrifice is required here to avoid an absurd result.

In its construction of the present statute, this Court has already indicated it is not to be read literally, by specifically approving as a possible practice grant of rehearing en banc by a majority of the three judges of the original panel. *Western Pacific R. Corp. v. Western Pacific R. Co.,* 343 U.S. 247, 261 (1953). This is in fact the practice in at least one circuit. See Rule 15(e), Eighth Circuit Rules. If, consistent with the statute, the full court can delegate to the three judges of the panel the

power to order or refuse rehearing, it is equally consistent with the statute for the court to delegate this power to the six judges who participated in decision of the motion for rehearing. There are many reasons—illness, absence from the circuit, statutory disqualification—why a judge may take no part in decision on a petition for rehearing. On the view taken by the court below, a judge who does not participate in any way is counted, in effect, as if he had voted to deny rehearing. The Third Circuit itself has held, quite sensibly, that the succeeding sentence in the statute, which provides in mandatory language that "a court in banc shall consist of all active circuit judges of the circuit," is not to be read literally, and that it can hear a case en banc though one of the judges in active service is away from the circuit and not participating. *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949). Thus if rehearing had been granted here, the case could have been heard in the absence of Judges Hastie and McLaughlin, and a vote of four-to-two for petitioner would have reinstated his judgment. Even if all the judges had participated after rehearing was ordered, and four judges had voted for petitioner on the merits, the contrary decision of the panel would be superseded and his judgment affirmed. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers*, 294 F.2d 399 (2d Cir. 1961), affirmed 370 U.S. ..... (1962); R.C., 51 Harv.L.Rev. 1287 (1931). If it is permissible to construe "all active circuit judges of the circuit" in the final sentence of 28 U.S.C.A. § 46(c) as meaning all active circuit judges who are not disqualified or otherwise not participating, a similar construction is permissible, and required by common sense, in the preceding sentence of that statute.

2. The construction of the Federal Employers' Liability Act by the court below is in clear conflict with decisions of this Court and of other courts of appeals.

The issue is whether a railroad is liable to its employee where he is injured on the premises of a third party because a defective condition on those premises creates an unsafe place to work. The court below undertook to resolve that issue by considering whether the negligence of the third party is attributable to the employer carrier as a matter of law. It decided that it was not, in the circumstances of this case, citing as sole authority for its decision the Second Restatement of Agency. Decisions of this Court, and the courts of appeals, have made it plain that refined concepts of common-law agency have no place in the solution of the problem.

The question here is not whether the negligence of a third party can be attributed to the employer, but whether the employer is itself negligent in breaching its non-delegable duty to exercise reasonable care to furnish its employees a safe place to work. *Ellis v. Union Pacific R. Co.*, 329 U.S. 649 (1947), establishes that this duty of the carrier continues even when it requires its employees to go onto other premises to work, and that the carrier is liable though the defect was in premises over which the railroad had no control. This is the holding also of *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959), reversing 168 Ohio St. 582, 156 N.E.2d 822 (1959). Harris was a Pennsylvania Railroad employee who was ordered to assist in retracking two cars which had left the tracks of the Nickel Plate Railroad. He was injured because of oil on a Nickel Plate tie. There was no evidence that the

Pennsylvania placed the oil there, or knew of its existence, but Harris was permitted to recover from the Pennsylvania.

If the analysis adopted by the Third Circuit in the present case had been employed in the *Harris* case, Harris would have been denied recovery unless it were found that the Nickel Plate was an agent of the Pennsylvania and thus that the negligence of the Nickel Plate was attributable to the Pennsylvania. That is not the analysis employed by this Court, in the *Ellis* and *Harris* cases. It is not the analysis employed by at least five other circuits, which have held that when a railroad sends its employee to work on premises not under the railroad's control, it is liable if it fails to exercise reasonable care to make sure that the employee is given a safe place to work. *Atlantic Coast Line R. Co. v. Robertson*, 214 F. 2d 746 (4th Cir. 1954); *Chesapeake & O. Ry. Co. v. Thomas*, 198 F. 2d 783 (4th Cir. 1952); *Kooker v. Pittsburgh & L. E. R. Co.*, 258 F. 2d 876 (6th Cir. 1958); *Beattie v. Elgin, J. & E. R. Co.*, 217 F. 2d 863 (7th Cir. 1954); *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948); *Denver & R. G. W. R. Co. v. Conley*, 293 F. 2d 612 (10th Cir. 1961).

Liability is of course dependent on lack of reasonable care, but it is settled in the cases that the railroad is under a duty to inspect premises to which it sends its employee, and that constructive knowledge will be imputed to it of a defect which would have been discoverable upon inspection. *Denver & R. G. W. R. Co. v. Conley*, 293 F. 2d 612 (10th Cir. 1961); *Chicago G. W. Ry. Co. v. Casura*, 234 F. 2d 441, 448 (8th Cir. 1956); *Van Horn v. Southern Pacific Co.*, 141 Cal. App. 2d 528, 297

P. 2d 479 (1956); *Schlueter v. East St. Louis Connecting Ry. Co.*, 316 Mo. 1266, 1282, 296 S.W. 105, 112 (1927). The evidence in the record that a P. & L. E. baggageman had earlier reported the defective condition of the door to his superiors, and that they had failed to repair it (21a, 42a), demonstrates that the defect here was one which inspection would have disclosed, and for which respondent is liable, whether or not on some nicety of agency law the knowledge of the P. & L. E. cannot be imputed directly to the B. & O.

3. The question presented is of importance in the administration of the Federal Employers' Liability Act.

The case presents no fact issue—both courts below agree that there was evidence from which the jury could have found the facts to be as petitioner claimed. But if the law is as stated by the Third Circuit, railroad employees have been deprived of much of the protection which the Act purports to give them. They will no longer be permitted any recovery under the Act for injuries suffered when their employer sends them to work on the line of another carrier. They cannot recover from the other carrier, for they are not its employees. They cannot recover from their employer in the absence of some showing that the second carrier was an agent of the employer. The Utah Supreme Court put the matter well:

> What the employee wants and needs is a reasonably safe place to perform his duties. He is not concerned with and indeed cannot know the technicalities of ownership, rental, lease or reciprocal exchange of facilities of an involved railroad system. For him to have the assurance of safety in some phases of his work and to be exposed to danger at

his own risk and responsibility in others would be contrary to reason. It might even be argued that he could better fend for himself on the master's premises where he was acquainted with his surroundings than on premises of third parties with which he is unfamiliar. The employer exercises exclusive choice both as to the place of work and control over safety factors. It is therefore not unreasonable to charge him with the duty of providing a safe place to work.

Butz v. Union Pacific R. Co., 120 Utah 185, 193, 233 P.2d 332, 336 (1951). In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958), this Court refused to permit an employer to avoid its responsibility under the Act by engaging another railroad to perform part of its work. The decision below would permit avoidance of responsibility by sending the employees to work on another railroad.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August ...., 1962

APPENDIX TO PETITION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 16438

MICHAEL SHENKER, Plaintiff

v.

THE BALTIMORE & OHIO RAILROAD COMPANY and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Defendants

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Opinion and Order

Marsh, District Judge.

In this F.E.L.A. case, there was evidence from which the jury could have found the following facts: On October 15, 1956, the 49-year-old plaintiff was employed by the defendant, Baltimore and Ohio Railroad Company (B. & O.) as a baggageman, his duties, inter alia, being to assist in loading and unloading mail cars at the passenger stations of defendants, B. & O. and The Pittsburgh & Lake Erie Railroad Company (P. & L. E.), at their Mahoningtown, New Castle stations. Tracks of the P. & L. E. and tracks of the B. & O. were located between the two stations. In order to service P. & L. E. mail cars, plaintiff had to leave the B. & O. station, cross the B. & O. and P. & L. E. tracks, and go upon the platform

of the P. & L. E. station. The P. & L. E. station was unmanned. The B. & O. ticket agent sold tickets to P. & L. E. passengers; plaintiff was paid by B. & O. and was subject exclusively to that company's orders and directions.[1]

Early in the morning, plaintiff pulled his wagon or cart onto the P. & L. E. platform, stopped it in front of the doorway of the mail car on a P. & L. E. train, and proceeded to pick up the mail bags on his wagon and swing some of them through the opening of the mail car door where the P. & L. E. baggageman, Beck, received them.

On this occasion the sliding door on the P. & L. E. car would not open its full width but would open only 18 to 20 inches. When plaintiff swung a mail sack weighing 80 to 100 pounds into the narrow opening, the width of this sack prevented it from going through the opening, and he had to exert considerable extra force to push it through the narrow opening into the car. In so doing, he twisted his body and felt a snap in his back. He reported the injury promptly to the B. & O. On subsequent examination, he was found to have sustained a ruptured intervertebral disc, which eventually required a laminectomy. This injury resulted in a permanent disability.

The defendant, B. & O., moved for a directed verdict which was denied. The jury found a verdict in favor

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1. The defendant P. & L. E. was granted a directed verdict because the plaintiff did not allege or prove that he was an employee of the P. & L. E., cf. Hull v. Phila. & Reading Ry. Co., 252 U.S. 475, and because they were both citizens of Pennsylvania. Jacobson v. N. Y., N. H. & H. R. Co., 347 U.S. 909 (1954), affg. 206 F. 2d 153; DiFrischia v. New York Central R. Co., 279 F. 2d 141, 143 (3d Cir. 1960).

of plaintiff in the sum of $40,000. Defendant now moves for judgment notwithstanding the verdict.

It was the duty of defendant employer to use reasonable and ordinary care to provide plaintiff, its employee, with reasonably safe cars, appliances, and equipment in connection with his work. A failure to do so is negligence. This duty is a continuing and nondelegable one. The fact that the car was owned by and located on the tracks of another railroad does not absolve the defendant employer from liability for the injuries its employee may sustain by reason of its failure to provide him with reasonably safe cars, appliances or equipment. Cf. Kooker v. P. & L. E. R.R. Co., 258 F. 2d 876 (6th Cir. 1958); Chicago Great Western Ry. Co. v. Catura, 234 F. 2d 441 (8th Cir. 1956); Beattie v. Elgin J. and E. Ry. Co., 217 F. 2d 863 (7th Cir. 1954).

The evidence, we think, was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause an injury to him; and that it was negligence to fail to eliminate the unsafe condition after notice thereof prior to the accident.

In addition, there was sufficient evidence from which the jury could find with reason that this unsafe condition contributed in whole or in part to the plaintiff's injury.

Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period sufficiently long that defendant, B. & O., had constructive notice thereof. Plaintiff testified that, immedi-

ately prior to the accident and while he and Beck were trying unsuccessfully to open the door wider, he told Beck, the P. & L. E. Baggageman, that he ought to get the door fixed, and Beck replied that he had reported it for repair, but that the door had not been fixed. T., pp. 27, 28, 53.

"Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was charged with knowledge" of the condition created by the defective door "which in the exercise of reasonable care it could have ascertained." Notice of a condition rendered unsafe by a defective appliance will be imputed to the employer where it could have been discovered by reasonable inspection and by the exercise of reasonable care. Beattie v. Elgin, J. and E. Ry. Co., supra, at p. 866;[2] see also citations, supra.

The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L. E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law.

We agree with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability, and if it could, how the jury could find that an injury

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2. This case distinguishes Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1 (7th Cir.), and Wetherbee v. Elgin, J. and E. Ry. Co., 191 F. 2d 302 (7th Cir.), relied upon by defendant.

could reasonably be foreseen; however, those issues, as well as the other issues mentioned, were for the jury. Lavender v. Kurn, 327 U.S. 645; Rogers v. Missouri Pacific R. Co., 352 U.S. 500; Sano v. Pennsylvania R. Co., 282 F. 2d 936 (3d Cir. 1960); and cases cited supra.

An order will be entered denying the defendant's motion for judgment n.o.v.

ORDER OF COURT

AND NOW, to-wit, this 8th day of August, 1961, after argument and upon due consideration of the parties' briefs it is ordered, adjudged and decreed that The Baltimore and Ohio Railroad Company's "Motion for Judgment N.O.V." be and the same hereby is denied.

(signed) Rabe F. Marsh
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 13,755

MICHAEL SHENKER
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, a Corporation
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant

Appeal From the United States District Court for the Western District of Pennsylvania.

OPINION OF THE COURT OF APPEALS

(Filed April 11, 1962)

Argued February 21, 1962

Before GOODRICH, KALODNER and GANEY, *Circuit Judges.*

By GOODRICH, *Circuit Judge.*

The plaintiff recovered a judgment against the defendant, The Baltimore and Ohio Railroad (B&O), in a suit under the Federal Employers' Liability Act, 45 U.S.C.A. §§51-60. The incident which is the basis of the plaintiff's complaint took place in a railroad yard at New Castle, Pennsylvania, where the B&O and The Pittsburgh & Lake Erie Railroad Company (P&LE) have adjoining parallel tracks. Each railroad has its own waiting room in this railroad yard, but only the B&O maintains a ticket

office. Tickets for P&LE passengers are sold at the B&O ticket window in the B&O station on the B&O side of these tracks. The plaintiff was a B&O employee whose duties included wheeling a loaded mail truck across the B&O tracks to the tracks of the P&LE, and loading the mail into a P&LE car. On the night in question plaintiff had brought his loaded truck to the door of the P&LE mail and baggage car. He claims that the door of this car stuck and that in endeavoring to force a large bag through the narrow opening of the car he wrenched his back and suffered the injuries complained of. Since the jury found in his favor his version of what happened must be taken to be accurate.

The court below was not completely happy with the verdict. See 196 F. Supp. 108 (W.D. Pa. 1961). He said that he agreed "with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability . . . " Nevertheless, being familiar with the decisions in this field, he did not interfere with the jury's verdict.

Our difficulty comes from one point which the court passed over rather lightly. He said:

> "The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L.E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law."

Our trouble comes in seeing how the negligence of the P&LE, if any, in having a defective door, became

attributable to the B&O as a matter of law. As the judge himself pointed out in addressing counsel during the trial of the case: "We have no contract in evidence. All we know is that the B&O Railroad was serving the P&LE trains by their baggage man." The car alleged to be defective belonged to P&LE. Nothing appears to show us that the B&O had any control whatever over the car or any employees of the P&LE. We do not know that the B&O became the agent of the P&LE, nor, indeed, as the trial court pointed out, anything more than that a B&O employee hauled the truck over to the P&LE tracks and put the bags in the car.

If the P&LE was the employer of the B&O in this kind of a transaction we do not see any basis for attributing the negligence of the employer to the employee who had no notice of the defect and who had no control over what its "principal" did. As is stated in comment *b* to section 350 of the Second Restatement of Agency:

> "The knowledge of another agent or of the principal does not affect the liability of the agent. Thus, an agent who has no reason to know that the instrumentalities which he uses are not suitable for the work . . . is not liable for harm caused by reason of that fact."

The Supreme Court decision in *Sinkler v Missouri Pac. R.R.*, 356 U.S. 326 (1958), is relied upon by the plaintiff. We think whatever impact that case has upon our situation tends to establish liability on the part of the P&LE and not the B&O.

The P&LE was initially joined in this suit. The judge dismissed the action against it on two grounds: (1) that no diversity of citizenship was shown; and (2) that there

was no employee-employer relationship between the plaintiff, Shenker, and the P&LE.

To conclude: There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer.

The judgment of the district court will be reversed.

KALODNER, *Circuit Judge,* dissenting

I would affirm the judgment of the District Court entered in favor of the plaintiff pursuant to the jury's verdict in his favor.

I agree with the District Court's holding, stated in its Opinion denying defendant's motion for judgment n.o.v., that "The evidence . . . was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause injury to him; and that it was negligence to fail to eliminate the unsafe condition after notice thereof prior to the accident", and that "Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period sufficiently long that defendant, B. & O., had constructive notice thereof." 196 F. Supp. 108.

On this appeal defendant does not even contend that the trial judge in his charge to the jury failed to adequately instruct it with respect to the law relating to any of the aspects or elements of the negligence charged by plaintiff against defendant. The record discloses that

not only did the defendant not except to the charge to the jury but that in response to the Court's question, addressed to trial counsel, "Gentlemen, have I misstated anything?" defendant's response was "No, Your Honor."

The majority premises its reversal of the District Court's denial of defendant's motion for judgment n.o.v. on its view that "There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer."

The sum of the majority's position is that the evidence failed to establish that defendant breached a duty to plaintiff. I disagree.

The record discloses that the P&LE did not maintain any employees at its Newcastle station;[1] defendant's employees serviced P&LE trains operating on its tracks which stopped at its station;[2] and plaintiff was assigned by defendant to load and unload P&LE mail and baggage cars. It was during a mail loading operation that plaintiff was injured by reason of a defective door of a P&LE mail car. Evidence was adduced that P&LE had been earlier advised that the door was defective.

These principles are well settled: It is the duty of a railroad to use reasonable care to furnish its employees with a safe place to work;[3] " . . . the standard of care

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1. Plaintiff's Interrogatory No. 17 and defendant's Answer thereto.

2. Paragraph 4, Stipulation at trial.

3. Bailey v. Central Vermont Ry., 319 U.S. 350, 352 (1943); Sano v. Pennsylvania Railroad Company, 282 F.2d 936, 937 (3 Cir. 1960).

must be commensurate to the dangers of the business;"[4] the fact that a railroad does not own, maintain or control the premises on which its employee is injured in the course of his employment does not relieve it of its legal duty to provide its employees with a safe place to work, nor does it absolve it from liability for injuries sustained by its employees because of unsafe condition of the premises.[5]

These instances of application of the principles stated are relevant here:

A railroad switchman was injured when the engine on which he was riding passed over a faulty section of track which broke causing him to be thrown to the ground. The track in question was neither owned nor maintained by the railroad which employed the switchman. The jury returned a verdict against the employing railroad. In affirming, the appellate court held that the absence of the elements of ownership or control of the premises on which the switchman was injured in the course of his employment did not relieve the employing railroad of its legal duty to provide him with a safe place to work; that "the duty the law imposed upon the railroad to inspect the tracks over which it moves its trains imputes to it constructive knowledge of the unsafe condition." Denver and Rio Grande Western Railroad Company v. Conley, 293 F.2d 612, 613 (10 Cir. 1961):

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4. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67 (1943).

5. Denver and Rio Grande Western Railroad Company v. Conley, 293 F.2d 612, 613 (10 Cir. 1961); Chicago Great Western Railway Company v. Casura, 234 F.2d 441, 447 (8 Cir. 1956); Beattie v. Elgin, Joliet & Eastern Railway Co., 217 F.2d 863, 865 (7 Cir. 1955).

A railroad switchman was injured in the course of performing his duties when struck by a defective gate on the property of a packing company which the railroad served. A jury verdict in favor of the injured employee against the employing railroad was affirmed even though it did not own or control the premises where the accident occurred. Chicago Great Western Railway Company v. Casura, 234 F.2d 441, 447 (8 Cir. 1956):

A railroad switchman was injured when in the course of performing duties assigned to him by his railroad employer he slipped on oil or grease on the steel platform of a coal dumper owned and maintained by the United States Steel Corporation on its property. A jury verdict in favor of the injured switchman against the railroad was affirmed on the appellate court's holding that the railroad's "knowledge, actual or constructive, of the allegedly dangerous condition of the place where the accident occurred was a question for the jury." Beattie v. Elgin, Joliet and Eastern Railway Co., 217 F.2d 863, 867 (7 Cir. 1955).

In the instant case the majority directed its attention to the status—agency or otherwise—which obtained or didn't obtain between defendant and P&LE relating to the servicing by defendant of P&LE's facilities, i.e. mail car.

In my opinion the question of the status referred to is academic. Assuming arguendo that defendant acted as a volunteer Good Samaritan in giving neighborly aid to P&LE in servicing its mail cars and not as a result of some contractual arrangement, the duties imposed by law on defendant to provide plaintiff a safe place to work would not be affected, one way or the other.

Principles of agency adverted to by the majority play no role nor do they have any impact in the situation here. Plaintiff's action against defendant is premised solely on an employer-employee relationship and a breach of the duty imposed by that relationship and not on any principal-agent status.

Assuming arguendo, as the majority did, that there existed a principal-agent relationship between P&LE and defendant, the impact of the agency principles pertaining to such relationship on plaintiff's case would be subject to the teaching of the Supreme Court that "Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job." Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326, 330 (1958). In *Sinkler* a railroad employee's injury was caused in whole or in part by the fault of an independent contractor performing operational activities of the carrier. It was nevertheless held that the independent contractor was an "agent" of the railroad within the meaning of the FELA.

In *Sinkler* the Supreme Court further said (p. 329):

> "However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, cf. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54. The cost of human injury, an inescapable expense of

railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. Kernan v. American Dredging Co., 355 U.S. 426, 431, 438."

Finally, the majority's reversal of the District Court's denial of defendant's motion for judgment n.o.v. requires reference to the holding in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) that:

"Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death."[6]

For the reasons stated I would affirm.

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6. Zegan v. Central Railroad of New Jersey, 266 F.2d 101, 102 (3 Cir. 1959).

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, KALODNER and GANEY, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the WESTERN District of PENNSYLVANIA and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

April 11, 1962

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and GOODRICH, KALODNER, STALEY, GANEY and SMITH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied. BIGGS, *Chief Judge,* and KALODNER, STALEY and SMITH, *Circuit Judges,* dissenting.

BY THE COURT
GOODRICH
Circuit Judge

Dated: June 1, 1962
